Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Maritime Employers Association,

applicant,

and

415607 Ontario Limited o/a Waterford Crushing and Screening,

respondent,

and

International Longshoremen's Association, Local 1654,

certified bargaining agent,

and

Great Lakes Stevedoring Co. Ltd.,

interested party.

Board File: 28368-C
Neutral Citation: 2011 CIRB **581**
April 21, 2011

The Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Patrick J. Heinke and John Bowman, Members, heard the above-cited reference, made pursuant to section 65 of the *Canda Labour Code* (*Part I Industrial Relations*), in Toronto, Ontario, on April 13 and 14, 2011. For the purposes of this decision, the terms stevedoring and longshoring are used interchangeably.

Appearances

Mr. John Mastoras, for the Maritime Employers Association;

Mr. Richard D. Simmons, for 415607 Ontario Limited o/a Waterford Crushing and Screening;

Mr. Ronald A. Pink, Q.C., for the International Longshoremen's Association, Local 1654.

I–Facts

[1] Since 1985, the International Longshoremen's Association, Local 1654 (ILA 1654 or the union) has held a geographic certification to represent all longshoremen working in the Port of Hamilton, Ontario. This certification was amended in 1991 to make it clear that the geographic certification applied to all employers in the longshoring industry in the Port of Hamilton, excluding certain employees of St. Lawrence Warehousing Limited operating as Seaway Terminals (now Federal Marine Terminals) who were represented by other trade unions (Board order no. 5893-U).

[2] By virtue of the operation of section 34 of the *Code*, the Maritime Employers' Association (MEA) has been appointed as the employer representative for all companies engaged in longshoring work in the Port. In the context of another Board file (27443-C), an order was issued by the Board on November 9, 2009, on consent of the parties, which declared that 415607 Ontario Limited, operating as Waterford Crushing and Screening (Waterford) was an employer in the longshoring industry in the Port of Hamilton within the meaning of order no. 5893-U and that Waterford was bound by the geographic certification order.

[3] Although Waterford advertises on its web site that it provides stevedoring services, the company's core activity is the production of aggregates (gravel) of all types. It began operation in the 1950s with a sand and gravel pit and now owns and operates a number of quarries, limestone pits and concrete ready mix plants. It screens (sizes) different materials for its own use and that of its customers. Waterford also has various slag and pelletizing operations, which involve turning waste materials created during the manufacturing process into usable material for other purposes. In this latter regard, Waterford has a longstanding relationship with US Steel Canada (formerly Stelco) in Hamilton. Among its other activities, Waterford acts as a material handler for US Steel Canada. Some 20 years ago, Waterford put forward a plan to turn Stelco's waste materials into useful

products and redesigned the dock at Pier 16 in Hamilton, where US Steel Canada's operations are located, so that a conveyor could be used to load these products onto vessels for marine transportation.

[4] In addition to its contractual responsibilities to handle materials for US Steel Canada at the Hamilton site ("the material handling operations"), Waterford uses equipment it supplies to convert US Steel Canada's waste material into useful products ("the conversion operations"). For example, US Steel Canada produces coke, a solid fuel made by heating coal. Waterford takes the coke tailings from this process and transforms them into various by-products, such as coke breeze, a product that is too fine to be used by US Steel but that can be used as a fuel by other companies. The products resulting from Waterford's conversion operations are stockpiled, using Waterford's equipment, on US Steel Canada's site until they are needed. All of the products handled by Waterford at this site remain the property of US Steel Canada and Waterford has no ownership interest in them. There is no corporate relationship between US Steel Canada and Waterford, other than those established by contract.

[5] The Board was informed that Waterford is a significant contractor at the US Steel Canada site in Hamilton and performs its material handling and conversion operations there year-round. Waterford maintains various pieces of equipment on the site, including a crusher, eight front end loaders and 20 conveyors. There is a dedicated employee trailer and separate washrooms for the Waterford employees on the site.

[6] Prior to 2010, in addition to the material handling and conversion work it did under contract to US Steel Canada, Waterford was responsible for loading various products (for example, slag and coke breeze) onto vessels calling at Pier 16, for delivery to other US Steel plants or to US Steel Canada customers ("the longshoring operations"). Waterford's longshoring activities in the Port of Hamilton at the time of the November 2009 order in Board file no. 27443-C consisted of the loading work that it was doing for US Steel Canada at Pier 16 and unloading salt from vessels and loading it onto trucks at Pier 26. As noted above, in the course of the Board's hearings in that matter, Waterford conceded that, for the purpose of these activities, it was an employer in the longshoring industry. Consequently, Waterford also consented to be bound by the ILA 1654 geographic

certification order. In the course of the current proceedings, the Board was informed that Waterford no longer performs the unloading of salt from vessels in the Port of Hamilton.

[7] Shortly after the Board order was issued in November 2009, Waterford made a business decision to cease all of its longshoring activities in the Port of Hamilton, although it did continue these activities in other locations in Ontario, such as US Steel Canada's premises in Nanticoke. Waterford informed US Steel Canada in early 2010 that it would no longer do longshore work in Hamilton and that US Steel Canada would have to retain a stevedoring company if it wished to continue loading the products onto vessels. Waterford learned in March 2010, that US Steel Canada had selected Great Lakes Stevedoring Co. Ltd. (GLS) to perform the longshoring work.

[8] Discussions subsequently took place between US Steel Canada, Waterford and GLS. US Steel Canada suggested that, since Waterford had a number of conveyors on site full-time, GLS could rent one of Waterford's conveyors for the purpose of loading the ships. What followed was a series of arrangements through which US Steel Canada contracted with GLS to load the product on board the vessels and contracted separately with Waterford to move the particular product to be shipped, by means of their front end loaders, from the stockpiles into the hopper on the dockside end of the conveyor. GLS contracted with Waterford for the supply of the equipment (a movable conveyor, attached hopper and cab) and the labour (a technician or utility man) necessary to move the product onto the vessel.

[9] As a result of these arrangements, the work is currently partitioned as follows: When GLS and Waterford are notified that there is a ship to be loaded, Waterford uses its own employees, operating its front end loaders and supervised by one of its foremen, to transport product from a stockpile on or near the dock to the bottom of the conveyor and to feed it into the hopper attached to the conveyor, under contract to US Steel Canada. Waterford supplies the conveyor and an employee to operate it under contract to GLS. All of this work is directed by GLS. None of the Waterford employees performing these operations are members of ILA 1654. The product is transported by the conveyor up onto the ship, where GLS uses two ILA members to load it into the vessel through the ship's hatches. The Board was informed that a total of nine ships were loaded in accordance with

these arrangements during 2010, and a further three ships had been loaded as of the conclusion of the Board's hearings on April 14, 2011.

[10] ILA 1654 became aware in early June 2010 that vessels were being loaded at Pier 16 using Waterford employees. It filed a grievance on June 3, 2010, alleging that Waterford and GLS were violating the collective agreement between the union and the MEA. The grievance was referred to an arbitrator, Mr. Robert Herman. Arbitrator Herman's proceedings have been adjourned pending a determination, by the Board, of a referral pursuant to section 65 of the *Code* by the MEA, which asks the Board to define the proper scope and interpretation of "longshoring" work at the Port of Hamilton.

II–Positions of the Parties

A–ILA 1654

[11] ILA 1654 suggests that this case involves a simple question: whether the loading of materials into a hopper attached to a conveyor, and thence onto a ship, constitutes longshoring. It argues that the answer is clearly yes. It submits that Waterford is ignoring a Board order to which it had consented in November 2009 and, with the aid of GLS, is endeavouring to evade the union's geographic certification and the collective agreement between the MEA and ILA 1654. It points out that other stevedoring companies, such as Federal Marine Terminals, cannot compete on an equal basis when GLS can quote for longshoring work based on using less than the number of unionized workers required by the collective agreement.

[12] The ILA takes the position that stevedoring commences when a product is piled for transhipment by vessel–that is, when the product is placed on the terminal for the purpose of transportation by marine vessel. It states that the only distinction between this situation and the normal work of a stevedoring company is that there are two contractors who have divided the loading work between them, but that neither of these contractors, GLS and Waterford, have valid grounds on which to assert that this work is not stevedoring.

[13] ILA 1654 points to the following provision included in its collective agreement with the MEA as support for the proposition that longshoring begins with the movement of the cargo to the conveyor so that it can be loaded onto the ship:

> 1.02 The agreement shall apply to employees while engaged in the handling of cargo discharged from or loaded on vessels at the Port of Hamilton, **including the transporting of such cargo to or from trucks and/or railway cars and/or such other inland conveyances**, in the handling of such cargo inside or outside the employers' terminals, as well as to work set forth in article 2.03 of this agreement.

[14] ILA 1654 argues that longshoring includes the movement of cargo from the means of inland transport by which it arrives at the dock, into a shed or onto a terminal lay down area, and from that shed or terminal onto the pier and from the pier to the ship. Conversely, longshoring as it relates to the unloading of a vessel consists of the movement of the goods from the vessel to the pier and for a shed and then onto a truck or railway car. It explains that these activities are all part of a continuum and that the marine transportation of the goods cannot take place unless all of these steps are completed.

[15] ILA 1654 concedes that the activities performed by Waterford in screening, converting and storing US Steel Canada's products on US Steel Canada's site is not longshoring, but argues that Waterford's activities become longshoring when they undertake the movement of the product from the stockpiles to the hopper for the purpose of loading it onto the ship. This latter work, the union says, is different from the rest of the work that Waterford does on US Steel Canada's site because it is integral to marine transportation. The ILA suggests that, like the employer in *M&M Manufacturing Limited* (1997), 104 di 45 (CLRB no. 1203), Waterford has extended itself into the longshoring industry. As the Board held in that case, to allow this type of incident to occur on a regular basis would undermine the collective bargaining system at the port, invite labour relations unrest, and defeat the purpose of section 34 of the *Code*.

[16] ILA 1654 asks the Board to issue a declaration that the work in question is longshoring and therefore subject to the collective agreement, and that Waterford be ordered to pay the appropriate amount in accordance with the collective agreement.

B–MEA

[17] The MEA submits that the aspect of the work related to the loading of vessels done by Waterford at US Steel Canada's site in the Port of Hamilton constitutes longshoring. On this issue, the MEA and ILA 1654 are *ad idem*. The MEA suggests that there is no evidence of anything nefarious, this is simply a misunderstanding on Waterford's part as to what longshoring is.

[18] The MEA notes that it is required to represent all longshore employers in the Port, whether they are dues paying members or not. Neither GLS or Waterford are currently members of the MEA. However, the MEA argues that the facts confirm that the work in question is longshoring. The MEA also notes that Waterford has provided no evidence to support the contention that US Steel Canada's piers are not part of the Port of Hamilton.

[19] The MEA advises that Waterford's performance of this work is the source of continuing dissension between the MEA and ILA 1654. As Waterford conceded in 2009 that it is a stevedoring company and is bound by the geographic certification by virtue of the Board's November 9, 2009 order, the MEA requests that Waterford be directed to comply with the collective agreement.

C–Waterford

[20] Waterford concedes that, when it is acting as a stevedoring company in the Port of Hamilton, it is bound by the geographic certification order and the collective agreement. However, it denies that it is performing longshoring work at US Steel Canada's Hamilton site. Waterford submits that it works at the US Steel Canada site every day, whether or not there are ships to be loaded. It uses US Steel Canada's waste to create useful product, which it stockpiles on the site using its own front end loaders, hoppers and conveyors. Waterford suggests that having its own employees, driving its front end loaders and loading US Steel Canada's product into hoppers connected to conveyors, is no different from the work that these employees do on the site every other day of the week. The only difference, in Waterford's view, is where the conveyor discharges the product.

[21] In this regard, Waterford argues that the longshoring activity only commences once the product is in the hopper: that moving the product on the dock, from the stockpile to the hopper, and putting it into the hopper, is not longshoring. Waterford further contends that the amount of this type of work that it does is very minor in relation to its other work for US Steel Canada; this work represents a tiny proportion of Waterford's time and a fraction of its activities at this site. It suggests that, because it moves the products on and around the site, and has the necessary equipment on site, it would not make sense for someone else to be responsible for moving the product from the stockpile to the hopper.

[22] Lastly, Waterford also suggested that the fact that US Steel Canada owns its own pier is a relevant factor, and that the Board should not apply the geographic certification order to privately owned piers in the Port of Hamilton.

III–Analysis and Decision

[23] The basis for federal jurisdiction over longshoring was thoroughly canvassed by the Board in the case of *Société des Arrimeurs de Québec Inc.*, 2009 CIRB 451, at paragraphs 199 to 211. Briefly, federal jurisdiction over longshoring does not exist as a result of an independent head of federal power, but because the activity is necessarily ancillary to marine transportation (see *Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529). While it is generally agreed that longshoring consists of the loading and unloading of ships, there has been considerable jurisprudence generated as to where those activities begin and end. The Federal Court of Appeal provided some guidance on this subject in *Cargill Grain Co., Gagnon and Boucher Division* v. *International Longshoremen's Assn., Local 1739* [1983] F.C.J. No. 948:

> 26 ...Because operations of sorting, handling and storing goods can be an incidental part of transport by sea, it does not follow that all operations of sorting, handling and storing goods, even on a wharf, are necessarily a part of such transport. **In my view, operations of this type are an incidental part of longshoring, and as such connected with the transport itself, when they are actually necessary in order to complete the transport operation and ensure that the goods are delivered to their recipient.**
> ...
>
> (emphasis added)

[24] Applying this test, the Board can only find that the pickup of materials from a stockpile and the transportation and unloading of those materials into a hopper that is connected to a conveyor which transports the materials onto the ship, for eventual delivery to their intended recipient, is part of a continuum that is not only necessary but essential to complete the marine transportation operation. As a result, the Board finds that, to the extent that Waterford performs these activities on the US Steel Canada site, it is engaged in longshoring activities within the meaning of the *Code*.

[25] Waterford has suggested that its longshoring activities are such a minor proportion of its work at the US Steel Canada site that it should be exempt from designation as a stevedoring operation. The evidence demonstrated that Waterford is actually engaged in a number of different activities at the US Steel Canada site. It works under contract to US Steel Canada to handle material for a variety of purposes related to the latter's operations at that site. It also engages in a conversion operation at the site, transforming waste into useful products. While all of Waterford's activities at the site utilize the same or similar equipment, the transportation and loading of product into a hopper for conveyance onto a ship is a discrete and severable portion of Waterford's business. From US Steel Canada's perspective, it makes sense to contract with Waterford to move the product from the stockpile to the hopper, because Waterford has the necessary equipment on site. US Steel could have hired GLS to do this work, but it would have been less cost effective to do so. US Steel Canada issues individual purchase orders to Waterford for the ship loading work, and Waterford invoices US Steel Canada separately for these activities. However, the fact that US Steel Canada selected Waterford over GLS does not change the nature of the work that is being done.

[26] GLS' contract with US Steel Canada included a requirement that it provide the hopper, conveyor and operator, likely because all parties knew that this work clearly constitutes longshoring and GLS was the stevedoring contractor. The fact that GLS subcontracted with Waterford to provide this equipment and the manpower to operate it does not mean that the activity no longer constitutes longshoring. Waterford admitted that the work it did with respect to the loading of the ships is supervised by GLS. It is GLS that directs the timing of when the product is to be transported and loaded into the hopper and the speed at which the product is conveyed up to the ship. The fact that Waterford does other work on US Steel Canada's site does not detract from or diminish its status as a stevedoring company for the purposes of these particular activities.

[27] Waterford suggested that its activities were similar to those of Québec Métal Recyclé, which the Board found, in the case of *Société des Arrimeurs de Québec Inc.*, *supra*, did not constitute longshoring activities. Québec Métal Recyclé was a scrap metal company that handled all of its own terminal activities relating to the sorting and piling of scrap metal at the dock for shipping, either by truck or ship. Four employees worked full time on the dock throughout the year; piling scrap metal was part of their daily activities and this work was done regardless of whether a ship was waiting to be loaded or not. However, the company was not involved in the delivery of the scrap metal. Such export work was done through a broker, who purchased the scrap metal, chartered a ship and engaged a stevedoring company to load the metal. Occasionally, at the request of the longshoremen and as a courtesy, a Québec Métal Recyclé employee helped to clean up the dock. The Board held that, in these circumstances, the piling of scrap metal by Québec Métal Recyclé did not constitute longshoring, even though one of the wheeled loader operators pushed the scrap metal to the dock line for its eventual loading. In the Board's view, the activity of Québec Métal Recyclé was the local operation of a metal scrap yard and the pushing of scrap metal with the wheeled loader was merely incidental to the operation of the scrapyard. In the instant case, it is US Steel Canada, not Waterford, that holds the analogous position to that of Québec Métal Recyclé; Waterford stands in a different position–it does not own the materials that it is moving and its work for US Steel Canada is done under a number of different contractual arrangements. In the Board's view, the aspect of the work Waterford is doing for US Steel Canada that is directly related to transporting US Steel Canada's products by ship is the work of a stevedoring company.

[28] It is important that, if Waterford continues to do this work, it do so under the terms of the MEA collective agreement. The purpose of the geographic certification provisions contained in the *Code* is to create and maintain stability in the longshoring industry. Parliament has decided that all employers of longshorepersons in a defined region are to have a single bargaining agent and one collective agreement that applies to everyone who performs longshoring work. As the Board said in *Halifax Grain Elevator Limited* (1989), 76 di 157 (CLRB no. 725):

> Notwithstanding how one describes this system of collective bargaining, be it accreditation, sector bargaining or whatever, this is the type of collective bargaining regime that is created when section 34 of the *Code* is invoked. With the joining together of all the employers in the longshoring industry who, from time to time use the available labour pool at a port, collective bargaining strengths are balanced and many of the frictions of multiple bargaining are eliminated. Both sides are theoretically forced to take

> cognizance of one overriding factor - the economic viability and well-being of the port. By bargaining a single collective agreement through an agent, all of the employers in the industry share the costs and the quid pro quo for the employees is the opportunity for steady employment with reasonable returns. This goes a long way to encouraging and maintaining interest in being part of a stable, experienced work-force which is capable of meeting the fluctuating demands of the employers.
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> **In this industrial relations scenario there is no room for free-loaders, everyone who hires longshoremen must do so through the system and share in the costs. This is one of the basic reasons why the Board's certification orders are generic in the terms of the bargaining unit. As each longshoring enterprise appears on the scene, its employees are caught by the certification order and the employer becomes bound by the collective agreement covering the port**. ...
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> **(pages 164–165, emphasis added)**

[29] The Board can find no merit in Waterford's suggestion that US Steel Canada's pier is not subject to the geographic certification for the Port of Hamilton. To the extent that Waterford placed reliance on the Board's finding in *Société des Arrimeurs de Québec Inc.*, *supra*, that the Ultramar wharf on the south shore of the St. Lawrence River was within the geographic area of the Port of Quebec but not subject to the geographic certification for that Port, the Board notes that the determining factors in that case were that a historical review of the scope of the geographic certification revealed that it had only ever been applied to longshoring activities on the north shore of the river; the union had never named any of the employers operating on the south shore in its certification applications, despite the fact that the companies had been operating there for over 30 years; and the union failed to provide evidence demonstrating viability, feasibility and community of interest. The current case is clearly distinguishable on its facts from the Port of Quebec case; the union included Waterford's US Steel Canada operations in its original 2009 application to the Board (Board file no. 27443-C) and filed its 2010 grievance as soon as it became aware that Waterford was continuing to engage in longshoring activities at the site.

[30] Accordingly, the Board finds that, for the portion of its activities on behalf of US Steel Canada that involve transporting the products from a stockpile, loading them into a hopper and operating the conveyor taking the products up to the vessel, Waterford is engaged in longshoring in the Port of Hamilton and is subject to the collective agreement between the MEA and ILA 1654. As a result of this determination, the Board finds that Waterford is in violation of the Board order of November 9, 2009, and it is hereby directed to comply with that order without further delay.

[31] As remedy for Waterford's failure to comply with the Board order and the applicable collective agreement, Waterford is ordered to pay to ILA 1654 an amount equal to the amount that would have been earned by the six Waterford employees who worked on the loading of each ship that transported US Steel Canada's products from Pier 16 between December 9, 2009, and the date of this decision, as if those employees had been paid pursuant to the collective agreement between the MEA and ILA 1654. The Board retains jurisdiction to determine the matter if the parties are unable to reach agreement on the amount owing to ILA 1654.

[32] In the course of these proceedings, the Board was informed that ILA 1654's June 2010 grievance also included a grievance against GLS concerning the use of a third union member on the vessel. This matter, which involves the interpretation of the manning provisions of the collective agreement is within the purview of the arbitrator and the Board declines to deal with this aspect of the dispute.

[33] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Patrick J. Heinke
Member

John Bowman
Member